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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 115

GENERAL MOTORS CORPORATION, *Appellant,*

v.

STATE OF WASHINGTON, *et al.*, *Appellees.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF APPELLEES

JOHN J. O'CONNELL,
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STATE PRINTING PLANT OLYMPIA, WASH., 1964

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STATE PRINTING PLANT OLYMPIA, WASH. 1964

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QUESTIONS PRESENTED

A fair and objective statement of the "Questions Presented" in terms of "the terms and circumstances of the case" (as required by Rule 40 (1) (d) (1)) is difficult because the facts and circumstances of this case are unique and complex.

Nevertheless, the appellees feel compelled to submit their own statement of the "Questions Presented," and chiefly for three reasons. First, in General Motor's statement, the nature of the Wash-

ington state tax in question is not accurately spelled out. Secondly, the character and extent of the appellant's relevant operations in the State of Washington are not sufficiently described. And thirdly, the key questions raised in this case in the light of past decisions of this Court are not sufficiently pinpointed. Accordingly, the appellees (hereinafter referred to as the "State") present the following restatement of the questions.

1. Is a Washington tax which is imposed upon persons for the act or privilege of engaging in business activities within the state and which is measured by the gross proceeds from wholesale sales to customers within the state, violative of the commerce clause of the federal constitution as an undue burden upon interstate commerce when applied to a multi-state corporation whose in-state business activities in furtherance of such sales, include:

(a) Development and maintenance of a quality retail dealer organization, with regular and constant contact with each dealer at the dealer's place of business, for the purpose of administering the taxpayer's contract with each dealer ("Dealer's Selling Agreement") which sets governing standards for all aspects and phases of the dealer's operations;

(b) Securing orders for the division's products;

(c) Assisting the dealers in all aspects and phases of their operations, including the training of their sales force; controlling the used product inventory; customer relations; car service operations;

(d) Regular and frequent training schools,

sales meetings, and other meetings to improve various aspects of the dealer's business and thus increase wholesale sales to the dealer;

(e) Other local activities of other divisions and subsidiaries of the taxpayer which are part of the taxpayer's overall automotive wholesale operations?

Subsidiary to this question are the following:

(1-a) Does the commerce clause of the federal constitution require, as a prerequisite for imposing such a tax, the existence of an in-state office through which are channeled, in some manner, the sales used to measure such a tax?

(1-b) If the answer to (1-a) is in the affirmative, does the existence of an in-state office, the function of which is to expedite deliveries to in-state purchasers, meet this requirement of the commerce clause?

2. Is such a tax violative of the commerce clause of the federal constitution on the grounds that the tax exposes interstate commerce to a risk of multiple burdens and double taxation because the tax, which is applicable to all who engage in similar selling activities within the State of Washington, fails to tax Washington manufacturers with respect to their manufacturing activities, if the gross proceeds from sales of such manufactured products have been included in the measure of the Washington tax on selling activities?

3. Does such a tax imposed under the circumstances described in the first question deprive

General Motors of its property without due process of law in violation of the fourteenth amendment?

Subsidiary to this question are the following:

(3-a) Does the tax unconstitutionally impinge upon transactions outside Washington's territorial jurisdiction?

(3-b) Does the tax lack reasonable fiscal relationship to taxpayer's in-state activities?

(3-c) Does the due process clause of the fourteenth amendment of the federal constitution require, as a prerequisite for imposing such a tax, the existence of an in-state office through which are channeled, in some manner, the sales used to measure such a tax? If so, does the existence of an in-state office the function of which is to expedite deliveries to in-state purchasers meet this requirement?

STATUTES AND CONSTITUTIONAL PROVISIONS

The basic Washington statutes involved in this proceeding are sections 220 and 270 of chapter 82.04 of the Revised Code of Washington. (Cited "RCW"; e.g., "RCW 82.04.220.") These are here quoted in part in order to show, at the outset, the nature and structure of the Washington tax involved.

RCW 82.04.220 imposes the tax in question by the following language:

> "There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall

be measured by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be."

The "measure" of the tax involved here is defined in the second sentence of RCW 82.04.220, *supra*, as the products of the "* * * rates against value of products, gross proceeds of sales or gross income of the business, as the case may be."

The "rate" of taxation, by which the measure is extended, is prescribed for the wholesaling category by RCW 82.04.270(1); i.e.:

> "Upon every person except persons taxable under subsection (1) of RCW 82.04.260 [relating to wholesaling of grain] engaging within this state in the business of making sales at wholesale; as to such persons the amount of tax with respect to such business shall be equal to the gross proceeds of sales of such business multiplied by the rate of one-quarter of one percent."

(During part of the audit period involved, the rate was .003 rather than .0025.)

COUNTERSTATEMENT OF THE CASE

Introductory Comment

The counterstatement set forth hereinbelow is offered by the State in order to identify the business activities engaged in within the State of Washington by General Motors (appellant), and to ascertain the relationship between those activities and the sales included in the measure of the tax involved in this case.

The State of Washington finds two general objections to General Motors' statement of the case. First, certain portions of the statement are misleading, if not actually inaccurate. Secondly, and more importantly, the statement as a whole gives at most the "bare bones" of a case in which, the State feels, the flesh is every bit as important as the bones.[1]

This restatement, then, will be primarily supplementary and secondarily corrective in nature. And, in order to give the clearest possible statement, and to avoid any risk of making questionable summaries or implications, frequent quotations from the actual record will be used.

Promotion and Maintenance of the GM Retail Dealer Organization—Concept and Purpose of the Quality Dealer Organization

The general and most basic function of the General Motors zone and field personnel who engaged in in-state activities in this case relate to the organization, development and maintenance of the General Motors retail dealer organization within the State of Washington. This is true for both the top positions (zone manager) and the bottom positions (district manager) in the zone organization, as stated by a Chevrolet zone manager:

> "A. Well, my responsibilities as Zone Manager generally are to secure and maintain a quality dealer organization of Chevrolet

[1] "It is possible to proliferate the detail but we think that doing so adds nothing to an understanding of the case and, on the contrary, tends to obscure the essentials. * * *" GM Br. p. 10. This statement is not surprising. To a great extent, this whole lawsuit resolves itself into a dispute over what the "essentials" are.

> dealers; to administer and promote programs, plans and procedures that will cause that dealer organization to give Chevrolet the best possible business representation in this area." (R. 76.)

And again:

> "A. Well, the duties [of the district manager] essentially are the maintenance of a quality organization—dealer organization—and the follow-through and administration of programs, plans and procedures within their district, that will help to develop the dealer organization, for the best possible financial and sales results." (R. 109.)

The end objective of maintaining this quality dealer organization is to promote and maintain the trade name of the particular division involved (R. 229) and thus "* * * to maintain within the industry a position comparable with what the division expects to obtain in business." (R. 80), or to obtain "* * * a fair share of the available market." (R. 177.)

Maintenance of the Quality Dealer Organization—the Dealer Selling Agreement

The dealer selling agreement is executed by General Motors and its dealer, and sets forth the relationship between them (R. 15). (The functions of the General Motors field organization in implementing this agreement and ensuring dealer compliance with it are described hereinafter, p. 15.)

The dealer's place of business, including salesroom, service station, parts and accessories facilities, and used car facilities, must be satisfactory to

General Motors, and General Motors is accordingly given the right to inspect such facilities at any reasonable time; moreover, the dealer may not establish a new location or branch office without General Motors' written consent (Pl. Ex. 2; R. 261, 71).

General Motors sets the capital requirements which must be met by the dealer, and requires the use by the dealer of uniform accounting systems established by General Motors. Also, the dealer must permit inspection of his financial accounts and records, and sales and service records by General Motors, and must submit monthly detailed financial and operating statements (Pl. Ex. 2; R. 262, 71).

The dealer must properly develop the sales potential in the territory assigned to him by General Motors, and must maintain a sales staff adequate to develop that potential (Pl. Ex. 2; R. 262, 71).

The dealer must handle customer complaints with a view to protecting the goodwill of both the dealer and General Motors (Pl. Ex. 2; R. 262, 263, 71). He must carry an adequate stock of parts (Pl. Ex. 2; R. 263, 71), buy any special tools developed by General Motors which General Motors deems necessary for proper service to car owners, employ a mechanical staff which General Motors deems adequate, perform work for General Motors' account to satisfy General Motors' warranty obligations on new cars, and permit inspection by General Motors of all service facilities and all stocks of parts and accessories (Pl. Ex. 2; R. 264, 71).

Maintenance of the Quality Dealer Organization—In-State Activities of Local and Resident Members of the General Motors Field Organization

The district managers and service representatives reside out in the field, away from the zone office. During the audit period in question, the Chevrolet, Oldsmobile, and Pontiac divisions had altogether, on an average, approximately twenty such employees, resident and/or principally employed in the State of Washington (R. 241). They each have an assigned territory comprising a section of the zone, and reside within that territory (R. 5, 17; D. Ex. 11; R. 393, 405-406, 210).

The service representative covers a wider geographical territory than the district manager (R. 17, 230). Thus, the Pontiac division has three district managers working within the state, one spending full time and the other two spending half their time there (R. 186); it also has one service representative working half time within the state (R.17). (This ratio may vary with the division involved. Thus, the Oldsmobile division has working within the state one less district manager but one more service representative than does Pontiac (R. 225-226)).

1. District Manager

The district manager has no office as such within the territory, but operates out of his home (R. 193), using his residence telephone for business purposes (R. 17), and using his residence itself for receipt of mail (R. 92).

The district manager's function in obtaining the monthly projections will be described, *infra*, p. 23; in addition to this function, he has other more general functions. As a former Chevrolet district manager testified:

> "Well, we have a number of different departments in the Chevrolet set-up. The District Manager is responsible to carry out the physical work of putting those things into effect with the dealers." (R. 138.)

Thus, the district manager serves as the zone manager's main direct contact with the dealer at the dealer's place of business (R. 17), and contacts the dealers

> "* * * in a supervisory or advisory capacity to see that they have the proper sales organization and to acquaint them with the Divisional sales policies and promotional and training plans to improve the selling ability of the sales organization. * * *" (Pl. Ex. 1; R. 246, 71.)

The district manager's function includes assisting the dealer's sales manager in organizing and training a sales force (Pl. Ex. 1; R. 246, 71), distributing promotional material (R. 140), and assisting in controlling used car inventory (Pl. Ex. 1; R. 246, 71).

He contacts the dealers assigned to him at least once a month, and may contact some of the larger dealers as often as once a week (R. 163, 194). Each district manager may have anywhere from twelve to thirty dealers in his district (R. 148, 185-186, 220-221).

2. Service Representative

The service or parts representative assists the zone parts and service manager, and in this capacity helps the dealer's service department on any problem involving General Motors' products (R. 187). He checks, in detail, on the adequacy of the dealer's service department to see that the dealer is complying with the selling agreement, and to see that General Motors' products are obtaining the best possible representation in the public mind (R. 227). ("Details" might include such things as a lack of cleanliness and the need for a new paint job in the dealer's place of business (R. 227)). If requested by the dealer or thought necessary by zone personnel, assistance to the dealer's service department may include a service clinic, at the dealer's place of business, wherein zone service personnel work with the dealer's service personnel to show the latter how to run properly the service department (R. 223).

The service representative also helps the dealer in handling any difficult customer complaints (Pl. Ex. 1; R. 247, 71), and in this function contacts owners of General Motors products who have registered complaints with the dealer or with General Motors itself (R. 187). In addition, he does some amount of training of the dealer's service personnel (R. 187; Pl. Ex. 1; R. 247, 71).

Maintenance of the Quality Dealer Organization—General Duties and In-State Activities of Non-resident General Motors Personnel

1. Zone Manager

The zone manager is in charge of all zone activities, and has the general responsibility of acquiring and maintaining a quality dealer organization to represent General Motors' products (R. 76, 185). As part of his efforts to maintain this organization, he sees dealers

> "* * * quite frequently, at least every sixty days in meeting form, and between those meetings we have other group meetings, to a point where in some cases I see some of our dealers almost every month in the year. * * *" (R. 110.)[2]

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[2]The testimony quoted above was obtained from the Seattle Chevrolet zone manager; but testimony by the Portland Pontiac zone manager is quite consistent with this. See esp. R. 187 and 188. Also, the Pontiac zone manager described the various purposes of the field meetings as follows:

"A. Prior to the announcement of a new model—a national announcement to the public of a new Pontiac we conduct sales training schools, more or less for the salesmen and the dealers, to acquaint them with the new features of the automobile, and we conduct service schools for the dealer's service department employees.

"* * *

"Q. These sales training meetings that you have, are those conducted at the District level?

"A. Not exactly the District level. We normally hold them in central places, Seattle, Spokane, Walla Walla, Yakima [all in Washington state] in order to accommodate the dealers in that particular area, lessen their travel.

"Q. All right. Now aside from the annual showing or preshowing meetings that you have just described, do you have any other meetings during the course of the year, any promotion or sales training meetings that you offer from your zone office?

"A. Periodically as the occasion arises we do have the same type of meeting, perhaps comparison meetings, for salesmen and

These contacts take place approximately half the time at the dealer's place of business, and the other half of the time at the zone level (R. 110).

2. Zone Business Management Manager

The zone business management manager has the responsibility of assisting dealers in developing more efficient management in all departments of their business. (Pl. Ex. 1; R. 245, 71).

He is the head of the business management department in the zone, the function of which is

"1. To build and maintain profitable dealers amply capitalized.

"2. To promote the sale of a constantly increasing volume of Pontiac products.

"3. To enable our field organization to make more efficient dealer contacts." (Pl. Ex. 3; R. 273, 71.)

His principal mission is to counsel with the dealers from the standpoint of their financial condition (R. 106) and he works "* * * between the office and the dealers, and contacts the dealers." (R. 106.) For instance, he is to be present, along with the zone manager if deemed advisable, at the

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dealers to point out the advantages in the Pontiac product over the competition.

"Q. And service meetings that you have in advance of showings, do you also conduct service meetings in between showings during the year?

"A. Oh, yes, service meetings are—service schools, rather, are held throughout the year.

"Q. And the purposes of those schools are what?

"A. To train dealer mechanics in the intricacies of the Pontiac product." (R. 200.)

dealer's place of business when the dealer's monthly plan of operation is set up (Pl. Ex. 3; R. 274, 71).

3. Zone Parts and Service Manager

The zone parts and service manager is responsible for making certain that owners of General Motors' products have adequate service available for their cars. (Pl. Ex. 1; R. 245, 71). His duties include the education of the dealer's service personnel through schools and other contacts, promotion of company service policies, and helping the dealer in handling difficult customer complaints (Pl. Ex. 1; R. 245, 71). These duties are partly carried out by contacts within the State of Washington (R. 186).

The purpose of having an adequate parts and service program is to increase customer favor generally, and this program is thus a part of the overall sales effort and public relations program (R. 95).

4. Zone Used Car Manager (Chevrolet Division Only)

The responsibility of the zone used car manager is to work with the dealers in assisting them to promote the best possible display of the used cars they have for sale, to follow the best possible merchandising methods, and to follow the best methods of reconditioning used cars (R. 122). For example, one program for promoting proper reconditioning methods involves actually going into the dealership with a truck and demonstrating how the reconditioning work should be done (R. 123).

The purpose of the used car program is to promote a better volume of new cars by increasing the volume of used car sales (R. 123).

Activities of Other General Motors Divisions or Subsidiaries

1. General Motors Parts Division

This division maintains warehouses in both Seattle, Washington, and Portland, Oregon (R. 18). (General Motors protests only inclusion of receipts from sales from the Portland warehouse in the tax base, not the inclusion of receipts from Seattle sales.) In connection with this Seattle warehouse, the Parts Division employed, during the audit period in question, between twenty and twenty-eight persons (R. 241).

Although the division is structurally and organizationally independent of the other General Motors divisions (R. 13), a Chevrolet zone manager testified:

> "* * * insofar as we are concerned in Chevrolet, we consider it as part of our division—at least that is the way that I have always looked at it. Now I may be wrong on it." (R. 93.)

The purpose of having an adequate parts program is to increase customer favor generally; and the program is thus part of the overall sales effort and public relations program (R. 95).

2. General Motors Acceptance Corporation

This subsidiary of General Motors is engaged in the business of financing the sale of General Mo-

tors products, and, through another corporate subsidiary of its own, Motors Insurance Corporation, insures them against physical damage (R. 13). General Motors Acceptance Corporation frequently handles financing arrangements for cars sold by General Motors to Washington dealers (R. 16), although a considerable number of the dealers are financed by institutions other than General Motors Acceptance Corporation (R. 197).

However, State's Exhibit 13 (R. 438, 243), showing the office space occupied by General Motors Acceptance Corporation in Seattle, Spokane, and Tacoma, Washington, and the office space occupied by Motors Insurance Corporation in Seattle and Spokane, was excluded by the trial court (R. 243).

3. United Motors Service Division

> "This Division provides warranty service on certain specialized automotive equipment such as Delco Remy, starting, lighting and ignition, etc. Dealers are to handle warranty transactions with them on those items not stocked by the G.M.P.D. or factory warehouses. * * *" (Pl. Ex. 3; R. 306, 71.)

Defendant's (State's) Exhibit 13 (R. 438, 243), showing the two warehouses of this division in Seattle, was excluded by the trial court (R. 243).

In-State Aspects of the Actual Sale

1. The Ordering Process

It is true that, technically, orders for the General Motors products directly involved in this case are generally received from dealers only by the

zone office, and are approved only by this office or the factory. (R. 17, 18.) (In a few cases, the district manager receives the orders and forwards them to the zone office (R. 18)).

However, in all cases "securing orders" is the function of the local district manager (Pl. Ex. 1; R. 246, 71). In performance of this function, the district manager, in conjunction with the dealer, works out once each month projections of the dealer's estimated needs. The district manager and the dealer make these projections on a thirty, sixty, and ninety-day basis, although basically they work on the coming month for which orders are to be submitted (R. 166). And "Basically, estimated requirements can be construed as a purchase order." (Pl. Ex. 5; R. 341, 71.)

These projections are by car model and include projections for accessories and equipment, as well as for the cars themselves (Pl. Ex. 5; R. 341, 71).

The relationship between these projections and the actual orders can be seen from the following testimony:

> "* * * Once that projection and estimate has been made, and a meeting of minds between the district manager and the dealer, or his representative, arrived at, the dealer then places individual orders with us on a separate form for the merchandise. Those separate forms, of course, are to allow him to specifically specify color option, and things of that character." (R. 124.)

"Q. I take it that these [projections] are negotiated by the district managers generally at the dealer's place of business?

"A. The transaction takes place in the dealership." (R. 125.)

2. The Delivery Process

General Motors implies that its obligations, so far as delivery is concerned, end when the automobile is placed on board the common carrier at its factory or warehouse (GM Br. 5-9).

It is true that orders are filled by shipment from the factory or warehouse, f.o.b. point of shipment. However, General Motors, and not the dealer, pays the freight charges to the carrier, General Motors later being reimbursed by the dealer; General Motors, moreover, has the right to select the mode of transportation (see, however, R. 263) and the right to charge the dealer average freight rates on a national, regional, zone or single market basis, rather than the actual freight rates (Pl. Ex. 2; R. 256, 71). Also, claims for loss or damage in transit are made by the dealer to General Motors, not to the carrier (Pl. Ex. 2; R. 257, 71).

Categories of Transactions Used to Measure the Taxes in Question

The taxes in question were measured by the gross proceeds from wholesale sales by General Motors to its retail dealers in the State of Washington under the following categories:

1. Chevrolet Class A Transactions.

2. Chevrolet Class B, Oldsmobile and Pontiac Transactions.

3. General Motors Parts Transactions.

All of these transactions occurred within an audit period from January 1, 1949, through June 30, 1953 (R. 13).

1. Chevrolet Class A Transactions

All of the activities described above were performed in connection with Chevrolet Class A sales. In addition, a Seattle branch office, operating under direction of the Portland zone office, participated in these sales principally by expediting deliveries (R. 58-59). It should be noted here that since January 1, 1954, General Motors has maintained a "zone office" in Seattle for its Chevrolet division. Its activities are taxed, and such taxes since 1954 are not in dispute here (R. 18). Such taxes are measured only by the gross proceeds of sale to General Motors' Washington dealers. Chevrolet Class A sales involve a total amount of approximately $220,000 in taxes (R. 7, 9).

2. Chevrolet Class B, Pontiac and Oldsmobile Transactions

All of the activities described above are performed in connection with Chevrolet Class B, Pontiac, and Oldsmobile sales. Thus, the extent or degree of local activity for which the tax is being imposed is the same as in Chevrolet Class A except for participation in these transactions by an in-state office which expedites deliveries. This category of

transactions involves a total amount of approximately $53,000 (R. 8, 10, 11).

3. General Motors Parts Transactions

The gross proceeds from sales of parts to General Motors dealers in Washington have been separated from the other categories. General Motors parts are sold to dealers in the State of Washington through two parts warehouses: one in Washington and one in Oregon. If the warehouse in Seattle does not stock a particular item, it is shipped from Portland (R. 18-19).

Although General Motors Parts Division does not have a field organization similar to that of other divisions, personnel from other divisions who do work with the retail dealers carry out General Motors policies relating to parts by means of the enforcement of the provisions of the Dealer Selling Agreement (Pl. Ex. 2; R. 263, 264, 71).

The sales of General Motors parts distributed from the Seattle warehouse have been included in the measure of General Motors' tax. This portion of General Motors' tax is not in dispute here. However, General Motors disputes the inclusion of the gross proceeds from sales of parts to retail dealers in Washington which were distributed from General Motors' Portland, Oregon, warehouse (R. 19).

This category of transactions involves a total amount of approximately $14,000 (R. 8), plus other unspecified amounts included in the previous category.

SUMMARY OF ARGUMENT

NATURE OF THE TAX

The tax in question is one imposed solely upon local business activities, and is measured by the gross proceeds of sales proceeding from those local activities. Thus, the tax is not a tax upon transactions or sales and the use of transactions or sales as a measure of the tax does not change the incidence or character of the tax. *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951); *Field Enterprises, Inc., v. State*, 352 U. S. 806 (1956); *American Manufacturing Co., v. St. Louis*, 250 U. S. 459 (1919). The attempt of General Motors to mischaracterize the tax only confuses analysis of the constitutional issues involved by confusing the tax's incidence with its measure.

Moreover, the tax is not a levy on the privilege of engaging in interstate commerce, and thus does not fall within the decision of this Court in *Spector Motor Service Inc. v. O'Connor*, 340 U. S. 602 (1951), and other related cases. The inapplicability of *Spector* has been clearly determined by the characterization of this tax by the State Supreme Court in *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325, and *Field Enterprises, Inc. v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010. And this characterization was confirmed by this court in its *per curiam* affirmance of the latter decision. 352 U. S. 806.

The reason for the inapplicability of *Spector* is based upon the fact that the tax here involved is a

tax upon business activities, rather than a franchise tax.

Although the tax here involved is one measured by gross proceeds, this fact alone does not make it unconstitutional or inherently discriminatory against either intrastate or interstate commerce. The power of states to use this type of tax, under proper constitutional limitations, is beyond question. *Norton Co. v. Department of Revenue, supra.* And General Motors' broadside attack against this type of tax is completely beside the point.

The Washington State Supreme Court in this case did not adhere to any fallacious "market state" concept, but rather applied the principles laid down by this Court in *Norton Co. v. Department of Revenue, supra,* and thus, in applying those principles, analyzed the nature and extent of General Motors' in-state activities in approaching the local market. The tax was imposed, not because of its customers within the state, but because of the nature and extent of the in-state activities in obtaining sales from these customers.

FIRST QUESTION—INTERSTATE COMMERCE

A. A tax imposed upon local selling activities by the market state and measured by the gross receipts of the sales proceeding from these activities is not inherently discriminatory, and is thus not inherently invalid. *Norton Co. v. Department of Revenue, supra.* But the rule is not the same for outshipments. *Freeman v. Hewit,* 329 U. S. 249; and the

fact that Washington may validly impose its tax here does not lead at all to the conclusion that all other states having a connection with the sales involved can impose a similar tax measured by the same gross receipts. Thus, there is no danger whatsoever of double taxation.

B. A tax imposed upon local selling activities in the market state and measured by gross receipts of the sales proceeding from these activities may be imposed even when the activities are connected solely with interstate sales. *Field Enterprises, Inc. v. State*, 352 U. S. 806. Thus, there is no constitutional necessity for the existence of a separable strictly intrastate business which is somehow connected with the interstate sales used to measure the tax in question. Nor is there any constitutional necessity for such a connection with an in-state office when the taxpayer, because of the nature and extent of its activities within the State, has localized and established itself there as permanently and just as definitely as if it did so through a fixed physical establishment. And this is precisely what General Motors has done in this case. Thus, it is completely unrealistic to try to bring General Motors' activities within the rule laid down in *Nippert v. City of Richmond*, 327 U. S. 416, relating to itinerant drummers.

However, if a fixed physical establishment is required, such a requirement is met by Chevrolet's branch office in Seattle, which participated in the Chevrolet Class A transactions by participating in

the delivery process. *Field Enterprises, Inc. v. State, supra.*

SECOND QUESTION—INTERSTATE COMMERCE

General Motors in effect complains that it is being discriminated against because a Washington manufacturer who is taxed on wholesaling activities in the State of Washington (with respect to products both manufactured and sold here) is not taxed on the local manufacturing activities involving the same products. This complaint, however, in effect demands that the State of Washington at least partially guarantee that General Motors' total tax burdens in the various states in which it operates cannot exceed the tax burdens of a strictly local manufacturer-wholesaler. The fallacy in General Motors' argument is illustrated by its misreliance upon *Halliburton Oil Well Cementing Co. v. Reily*, 373 U. S. 64, in which this Court struck down a Louisiana tax which was *per se* discriminatory against property brought in from outside the state. This Court in *Halliburton* in no way did what General Motors now asks it to do, viz., strike down a perfectly uniform tax in one state simply because that state does not levy any other sort of tax, on completely different activities, to which General Motors may be exposed in other states.

THIRD QUESTION—DUE PROCESS

The Washington tax in question is not an unwarranted projection of state taxing power over sales or transactions which take place outside its borders; for the tax is imposed only on local activities, not on sales or transactions. Moreover, the de-

tailed nature and broad extent of General Motors in-state activities in connection with such sales fully justifies the use of such sales as the measure of the tax here. The due process considerations present in *Norton Co. v. Department of Revenue, supra*, clearly show this. For in this case, the local activities performed in connection with the sales used to measure the tax were even more essential to the transactions involved and more extensive than the activities in *Norton*.

ARGUMENT

Nature of the Tax

General Motors frequently mischaracterizes the nature of the tax involved in this case. For instance, it is asserted that the tax is a tax imposed "* * * on the privilege of engaging in exclusively interstate commerce." (GM Br. 38; see, also, GM Br. 16, 37, 39); "A direct unapportioned tax on gross receipts from interstate commerce * * *" (GM Br. 39); and "* * * on the privilege of doing things * * * which are done almost exclusively without the state * * * thus attempting to tax privileges * * * [granted by] Oregon, California, Missouri and Michigan. * * *" (GM Br. 16.) For this reason it is necessary to examine at the very outset what is primarily a question of state law rather than federal law, namely, the exact nature of the tax involved.

A. The Tax is a Tax Upon Solely In-State Business Activities

The Washington business and occupation tax, as consistently construed and applied by the Washington State Supreme Court, is in law and in actual operative effect a tax upon local business activity. *Cf. Field Enterprises, Inc. v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010, aff. per curiam, 352 U. S. 806 (1956); *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325, cert. den., 342 U. S. 876 (1951); *U. S. Steel Corp. v. State*, 51 Wn. (2d) 224, 316 P. (2d) 1099 (1957); *Crown Zellerbach Corp. v. State*, 45 Wn. (2d) 749, 278 P. (2d) 305 (1954). The words of the statute provide that the tax is "* * * levied and shall be collected from every person * * * for the act or privilege of engaging in business activities. * * *" within the State of Washington. (RCW 82.04.220.)

Thus, the tax here is imposed upon General Motors solely for the act or privilege of engaging in business activities within the State of Washington. (RCW 82.04.220.) And the tax is measured "* * * by the application of rates against value of products, gross proceeds of sales, or gross income of the business, as the case may be." (RCW 82.04.220.) The Washington State Supreme Court, in the opinion below, construed RCW 82.04.220 as authorizing the state to tax "* * * only that which

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"* * * The tax is measured solely by appellant's local wholesale and retail activities. No part of the tax is attributable to its manufacturing or other out-of-state activities. * * *" *U. S. Steel Corp. v. State*, 51 Wn. (2d) 224, 226, 316 P. (2d) 1099.

takes place within its borders, * * * measuring the tax by transactions which relate sufficiently to the activities in question to be within the requirements of the due process clause." (R. 451.)

Negatively stated, the tax is not imposed upon transactions or sales. Proceeds from transactions or sales are used solely as a measure of the tax, and then only when they are derived from in-state buyers and are attributable to the in-state activity being taxed.

It is important to note in this regard that since January 1, 1954, the Chevrolet Division of General Motors has had a Seattle Zone which is headquartered in Seattle, Washington, and covers part of Idaho and all of Alaska, as well as most of Washington (R. 14, 73). Proceeds from sales to General Motors' Alaska and Idaho dealers are *not* included in the measure of the tax upon the activities of this office, despite the fact that the "transactions" involved have occurred there for the most part. The same would be true where automotive parts are shipped by common carrier to such out-of-state dealers from stocks in the Seattle warehouse of the Parts Division of General Motors. See *Crown Zellerbach Corp. v. State*, 45 Wn. (2d) 749, 278 P. (2d) 305 (1954). In that case the Washington Supreme Court, on the basis of *Freeman v. Hewit*, 329 U. S. 249 (1946), interpreted the commerce clause and the Washington statutes as forbidding the inclusion of such outgoing sales in the measure of the tax.

B. The Use of Sales Made in Interstate Commerce as the Measure of the Tax Does Not Change the Incidence of the Tax.

The difference between the statutory incidence of a tax and the statutory measure of that tax has consistently been recognized by this Court, and has been given important constitutional significance in sustaining state taxes. Thus, in *Norton v. Dept. of Revenue*, 340 U. S. 534 (1951); and *Field Enterprises, Inc. v. State*, 352 U. S. 806 (1956), a tax imposed upon local business activities was sustained even when certain types of interstate sales were used to measure the tax upon the local activities being taxed. Likewise, in *American Manufacturing Co. v. St. Louis*, 250 U. S. 459 (1919), proceeds from interstate sales were allowed to be used to measure a tax upon local manufacturing activities. See, also, *Western Livestock v. Bureau of Revenue*, 303 U. S. 250 (1938). In each of these cases, this Court recognized that the legal incidence of the tax was local activities, and only local activities; and it further recognized that the fact that interstate sales were used to measure the tax did not change the incidence of the tax. This is not to say, of course, that a tax cannot offend by an improper measure; clearly it can, and the Washington Supreme Court has consistently recognized this principle in *Crown Zellerbach Corp. v. State, supra*; *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325, cert. den. 342 U. S. 876 (1951); and this case (R. 451). But it only obscures the issues and renders the analysis of the constitu-

tional problems more difficult if the distinction between incidence and measure is not kept clearly in mind; and the attempts of General Motors to confuse the two must not be allowed to obscure this important distinction.

C. The Tax in Question is not Invalid as a Levy on the Privilege of Engaging in Interstate Commerce (In Answer to General Motors' Argument: pp. 34-39)

General Motors strenuously attempts to strike down the tax in question by bringing it within the ambit of this Court's decision in *Spector Motor Service v. O'Connor*, 340 U. S. 602 (1951), and other related cases.[4]

The tax in *Spector* was struck down by this Court because, in the words of this Court:

> "* * * The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. * * *" 340 U. S. 609.

And the franchise was not a proper "constitutional channel" (340 U. S. 608) through which the tax could be imposed, although the tax was properly apportioned to in-state activities of a motor carrier engaged solely in interstate hauling.

Is the Washington tax of the same type as the Connecticut tax? That is, does it involve the same constitutional channel? To answer this question, we

[4]For the convenience of this Court, the State has generally followed the order of discussion used by General Motors. However, because General Motors' argument based upon *Spector* involves a question now under discussion, viz., the precise nature of the incidence of the tax under state law, in addition to commerce clause questions, the argument is treated here rather than in regular order.

must look to the decisions of the Washington State Supreme Court, just as this Court looked to the decisions of the Connecticut Court in *Spector*; and with such a look, we see that the Washington State Supreme Court clearly considers the Washington tax to be different. In *B. F. Goodrich Co. v. State, supra*, the Court expressly stated that *Spector* was not applicable to the case before it, which involved the applicability of the same tax involved in this case to a multi-state business making interstate sales to its Washington customers (See 38 Wn. (2d) at 677). The Court stated that the case was to be governed by *Norton v. Dept. of Revenue, supra*, rather than *Spector*. The only conclusion to be drawn from this is that the State Supreme Court considers the Washington tax to involve the same type of "constitutional channel" as was involved in *Norton*, rather than the type involved in *Spector*.

Again, in *Field Enterprises, Inc. v. State*, 47 Wn. (2d) 852, 856, 289 P. (2d) 1010 (1955), the State Supreme Court stated that *Spector* was not applicable to a case in which the taxpayer was engaged in business activities within the state which involved *solely* interstate sales. But most importantly, on appeal to this Court, the argument based on *Spector* was squarely raised again. (See Jurisdictional Statement, *Field Enterprises, Inc. v. State of Washington*, No. 214, October Term, 1956, p. 5) And this Court affirmed the State Supreme Court *per curiam*, citing *Norton* as controlling. 352 U. S. 806 (1956).

The reason for these results can be found in the statutory language itself, which states that the tax is to be "* * * levied and * * * collected from every person * * * for the act or privilege of engaging in business activities." RCW 82.04-.220.

The State does not deny the presence of the word "privilege" in the statute. But unlike the Connecticut tax involved in *Spector*, the Washington tax does not attach solely to the "privilege," if it can be said to attach to it at all. As stated by the State Supreme Court, "These *activities* provide an *incident* upon which the taxing statute operates." (R. 447-448.) (Emphasis supplied.) And again: "The tax is imposed upon business activity within the state. The measure of the tax is the proceeds from the sales attributable to that activity." (R. 453.)

In short, *Spector* can be applied to this case only at the cost of completely ignoring two Washington State Supreme Court decisions and one decision of this Court, all of which clearly faced and rejected the precise argument made by General Motors here concerning the nature of the Washington tax. And by the same token, much of General Motors' argument can be disposed of by beginning with a logical analysis of the legal incidence of taxation. Having identified the tax incidence as in-state "business activity" we can now proceed with the resolution of the essential constitutional questions.

D. Economic Aspects (GM Br. 17-34)

It is extremely difficult to respond to the arguments presented by General Motors under the heading of "Economic Aspects" because the State considers them, for the most part, irrelevant. The primary purpose of this discussion, therefore, will be simply to show why they are irrelevant.

Generally, the arguments constitute a broadside attack on *all* business taxes measured by gross receipts, be the business solely intra-state or be it multi-state. And, with commendable consistency and candor, the attack is culminated by a salvo against this Court's decision in *Norton v. Dept. of Revenue*, 340 U. S. 534 (1951), the leading decision involving the constitutionality of a business tax measured by gross receipts derived from interstate sales (GM Br. 32-34). And this shows the general reason for the irrelevance of these arguments; that is, *Norton* constitutes settled law, which can be unsettled—to use the words of General Motors—only by "* * * upsetting understandings which tax collectors and taxpayers alike have had for years. * * *" (GM Br. 31.) Nevertheless, each argument will be dealt with in order.

Re: Three Types of Taxes (GM Br. 31)

The State agrees with General Motors that net income taxes, sales and use taxes, and business taxes measured by gross receipts should be carefully distinguished, (GM Br. 17-19); in fact, the State has already devoted much discussion to the difference

between a tax *on* sales and a tax of which sales are only the measure. (See, *supra*, p. 32.) However, General Motors goes on to state that the tax in this case does not come into court with "clean hands" since it is reflected in company-wide prices, and thus comes out of buyers generally, rather than only from buyers in Washington (GM Br. 19). The relevance of this consideration is hard to understand.

Property taxes, for example, imposed upon General Motors' factories and offices in Michigan or California are undoubtedly also reflected in company-wide prices. But this is certainly not a helpful consideration in determining whether or not such property taxes are constitutional. Moreover, if "clean hands" is a consideration, it should be pointed out that General Motors' argument, in part at least, as to the economic impact of *this* tax, is not based upon fact. True, RCW 82.04.500 provides that the tax here involved is to be absorbed by the vendor as part of its overhead. But this statute has hardly been complied with by General Motors. Over the vigorous objection of General Motors' counsel, the State attempted to show (in the trial court) that during portions of the audit periods involved in this case General Motors passed on to its dealers in Washington the taxes which it now wants refunded, billing the dealers for "Washington Handling Charges" (R. 212, 213, 214).

Re: Pyramiding: "Basic Unsoundness of this Tax" (GM Br. 19-21)

General Motors states that the first of the two fiscal and economic problems which the State Supreme Court did not take into consideration is the basic unsoundness of the tax in question, and that failure to take this into consideration "* * * no doubt contributed confusion to the State Court's deliberations." (GM Br. 21.)

The State submits that taking this irrelevant problem of possible tax pyramiding into consideration would certainly have contributed confusion to the deliberation of the State Supreme Court. For General Motors shows no relationship whatsoever between the problem of alleged discrimination between strictly intrastate businesses and the alleged discrimination against interstate commerce which General Motors states is involved in this case.

But more importantly, General Motors contends that this Court has recognized this type of tax to be "* * * inherently discriminatory against interstate commerce * * *" (GM Br. 20), and therefore we presume, to be inherently unconstitutional. But if this is so, how can the cases of *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951), and *Field Enterprises, Inc. v. State*, 352 U. S. 806 (1956), stand? Both cases will be thoroughly discussed later; we only note here that in both, this Court sustained a tax of exactly this type, i.e., a tax imposed on local selling activities and measured by interstate sales attributable to these activities.

In its discussion of the "second obstruction"

(GM Br. 21) to the State Supreme Court's reaching a correct result, General Motors attacks the alleged "preoccupation" of the Court with the "market state" concept and the "general tone" of the Court's opinion (GM Br. 21) in this case, as well as the "sentiment" expressed by the Court in the prior case of *B. F. Goodrich Co. v. State*, 38 Wn. (2d) 663, 231 P. (2d) 325. (GM Br. 21.)

The State fails to see how this sort of legal psychoanalysis contributes to an understanding of the issues involved in this case. Both in this case and in *Goodrich*, the State Supreme Court was simply attempting to apply the principles laid down by this Court in *Norton Co. v. Department of Revenue*, *supra*. And the State Supreme Court in this case was no more "preoccupied" with a "market state" concept than was this Court in *Norton*. The State Court was "preoccupied," if one may so use the term, with the nature and extent of the taxpayer's in-state activities; but the same can be said of this Court in *Norton*.

And quite properly so. For in *Norton*, and in this case, the crucial problem revolves around the means by which the seller approaches the local market, and the nature of the in-state activities involved in obtaining sales from that market. It does not contribute to a solution of this problem to launch into a long, though admittedly interesting, discussion of the "fallacious economic concept of the 'market state.'" (GM Br. 23.)

However, the State feels that at least one assertion contained in that discussion by General Motors should not be left unchallenged, for it is quite relevant to the problem at hand.

The quotation from the opinion of Mr. Justice Rutledge, concurring *General Trading Co. v. State Tax Commission*, 322 U. S. 335, and *International Harvester Co. v. Department of Treasury*, 322 U. S. 340, and dissenting in *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327, at page 361, does not apply solely to sales and use taxes, as General Motors would have us believe. (GM Br. 23.) The *International Harvester* case involved the Indiana gross receipts tax, which, as General Motors itself points out (GM Br. 33), is basically similar to the Washington tax involved in this case. This point is important, because Mr. Justice Rutledge's analysis has little, or nothing, to do with the fact that sales or use taxes fall upon the purchaser rather than the seller.

Rather the analysis shows why, in the distribution of power to impose taxes upon interstate transactions or, as here, to measure taxes by interstate transactions, the state of market should be given preference over the state of origin. The reason, of course, is that this preference for the market state tends to equalize competitive conditions, both as between interstate sellers from different states of origin, and as between interstate and strictly intrastate sellers.

This consideration is the basis for a meaningful "market state" concept, and, as we have shown, this embodies precisely the approach which the State of Washington takes in its taxing policy. (See p. 33, *supra*.) But this is not the same "market state" concept which General Motors discusses and for which it says the State Supreme Court has "fallen." (GM Br. 23.)

Re: Impact of the Decision; Effect on Local Governments and Competition. (GM Br. 31-34.)

General Motors states that the decision of the Washington State Supreme Court, if allowed to stand, would do enormous damage to interstate commerce. (GM Br. 32.) Yet, almost immediately thereafter it states that the type of tax involved herein is becoming a thing of the past, and strongly urges this Court to hasten its demise and, apparently, to do so by overruling *Norton Co. v. Department of Revenue*, 340 U. S. 534. (GM Br. 33.) This is a most surprising juxtaposition of arguments.

However, the main point to be noted here is this: the question of whether or not alternative types of taxes may be available to the state is not at all relevant to the issues in this case. The relevant question is whether or not *this* Washington tax, as applied in *this* case, meets constitutional requirements. And to this question we now proceed.

FIRST QUESTION—INTERSTATE COMMERCE

"As has been so often stated but nevertheless seems to require constant repetition, not

all burdens upon commerce, but only undue or discriminatory ones, are forbidden." *Nippert v. City of Richmond*, 327 U. S. 416, 425.

A. The Tax Neither Discriminates Against Interstate Commerce Nor Exposes the Interstate Commerce Involved to multiple burdens. (G M Br. 39-45.)

Under this heading, we wish to treat two arguments made by General Motors under two separate headings. For the two arguments are so closely related that they should logically be treated together.

The first argument, viz., that the tax is invalid as a levy on unapportioned gross receipts derived from interstate commerce (GM Br. 39-42), is based squarely upon the language of this Court in *Gwin, White & Prince, Inc., v. Henneford*, 305 U. S. 434, which, in summary states that where a tax is imposed on in-state activities, and is measured by amounts derived from both in-state and out-of-state activities, but the measure is not apportioned to the in-state activities, such tax is unconstitutional because its measure exposes interstate commerce to the risk of multiple burdens to which local commerce is not exposed. (See GM Br. 41-42.)[5]

General Motors' argument is that the tax in question is precisely such a tax; that is, since the tax is measured by receipts derived from both in-state and out-of-state selling activities, and since these receipts are not apportioned to the in-state activities, the tax must fall.

[5]We thus see that the first argument is not really distinct from the second argument, i.e., the argument on multiple burdens.

This argument, however, cannot stand in the face of *Norton Co. v. Department of Revenue*, 340 U. S. 534, for the tax there was also precisely such a tax. In that case, an Illinois tax upon retailers was measured by the gross receipts derived from certain interstate sales, such sales having been produced in great part by activity taking place outside the taxing state, i.e., in Massachusetts, where the orders for the sales in question were accepted and filled. *But in Norton there was no such apportionment of the measure of the tax to in-state activities*, as is demanded by General Motors here. Nor was there any such apportionment in *Field Enterprises, Inc. v. State*, 352 U. S. 806 (1956), in which this Court affirmed, *per curiam*, on the basis of *Norton*, a decision of the Washington State Supreme Court involving the precise tax now in question. In that case, the State Supreme Court upheld this tax when imposed upon the in-state activities of a company engaged solely in the business of soliciting orders for goods to be sold in interstate commerce, the orders being forwarded through a Washington office to Chicago, for acceptance and filling in Chicago.

General Motors' statement, therefore, that the reasoning in the language it quotes from *Gwin, White & Prince, Inc., v. Henneford, supra*, is applicable to inshipments and has in fact been applied in such cases is simply not correct. (GM Br. 42.) *Norton* and *Field* refute this statement completely. And the one case which General Motors cites in sup-

port of this statement, *West Point Wholesale Grocery Co. v. City of Opelika*, 354 U. S. 390, is clearly distinguishable. (GM Br. 42.)

General Motors correctly points out that this case involved a flat fee type of tax; but it neglects to point out that this flat fee applied only to merchants who delivered their goods from outside the taxing jurisdiction, while strictly local merchants were subject to a tax graduated upon their gross receipts, and in effect had, as this Court clearly pointed out, a substantially lesser tax burden than the taxpayer. The *West Point Wholesale Grocery Co.* case, in short, involved a tax structure that was inherently discriminatory against the selling activities of merchants operating from outside the taxing jurisdiction, and thus has no application whatsoever to the present case.

At this point, the precise nature of the disagreement between General Motors and the State should be clarified. The State agrees completely with the basic premise of General Motors' argument, viz., that the several states must not be allowed each to carve out from the process of interstate selling a taxable incident, and then each use the same gross proceeds of sale as the measure for each state's tax upon such an incident. Such multiple taxes would be completely intolerable. Thus, the State agrees completely with this Court in the *Gwin* case when it stated:

> "* * * Such a multiplication of state taxes, each measured by the volume of the com-

merce, would re-establish the barriers to interstate trade which it was the object of the commerce clause to remove. * * *" 305 U. S. 434, 440.

And the State agrees completely with the excerpt quoted by General Motors from *Nippert v. City of Richmond*, 327 U. S. 416, expressing substantially the same idea. (GM Br. 43-44.)

For example, it would be intolerable if the State of Massachusetts, the state of origin for the sales involved in *Norton Co. v. Department of Revenue*, *supra*, would be allowed to do what this Court in that case allowed the State of Illinois, the market state, to do; viz., to measure a tax upon the selling operations occurring in the taxing state by the gross proceeds derived from the sales involved. Indeed, it would be intolerable to allow Massachusetts to use even a portion of these gross proceeds to measure a tax upon the Norton Company's selling operations, for this too would be multiple taxation.

But the State disagrees completely with the solution to the problem of multiple taxation which General Motors suggests, viz., allowing *no* state to tax.

And the above example illustrates the precise solution which this Court appears to have worked out to solve this problem of multiple taxation. In every case in which the state of origin has attempted to impose this type of tax, or a similar tax, the tax has been struck down. *Freeman v. Hewit*, 329 U. S.

249; *Adams Manufacturing Co. v. Storen*, 304 U. S. 307; *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434.

General Motors states:

> "* * * Its [the Washington State Supreme Court's] decision exposes the same gross receipts to a similar tax in every state in which some part of the sales transaction happens to occur. * * *" (GM Br. 44.)

This statement is the key to General Motors' whole attempt to invalidate this tax, on the grounds that it taxes "unapportioned gross receipts," (GM Br. 39) and exposes interstate commerce to "unapportioned multiple burdens". (GM Br. 42.)

But this statement is simply not true, as the three cases just cited show.[6]

Perhaps the best analysis of the problem of multiple burdens is to be found in the concurring opinion of Mr. Justice Rutledge, in *Freeman v. Hewit*, 329 U. S. 249, 277-279.

> "* * * There is no need to give interstate commerce a haven of refuge from taxation, albeit of gross receipts or from 'direct' incidence, in order to safeguard it from evils against which the commerce clause is designedly protective. Less broad and absolute alterna-

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[6] It is true that both *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434, and *Adams Manufacturing Co. v. Storen*, 304 U. S. 307, intimate that the state of origin might be allowed to impose a tax on selling operations if the measure were apportioned to in-state activities. *Freeman v. Hewit*, 329 U. S. 249, however, would not even allow an apportioned tax. And, in view of the result of *Norton Co. v. Department of Revenue*, 340 U. S. 534, the state of origin *should not* be allowed to impose any such a tax, *even if apportioned*.

tives are available and are adequate for the purpose of protection without creating the evils of total exemption.

"The alternative methods available for avoiding the multiple state tax burden may now be stated. They are: (1) To apply the Adams ruling, stopping such taxes at the source, unless the tax is apportioned, thus eliminating the cumulative burdens; (2) To rule that either the state of origin or the state of market, but not both, can levy the exaction; (3) To determine factually in each case whether application of the tax can be made by one state without incurring actual danger of its being made in another or the risk of real uncertainty whether in fact it will be so made.

"* * *

"As among the various possibilities, I think the solution most nearly in accord with the commerce clause, at once most consistent with its purpose and least objectionable for producing either evils it had no design to bring or practical difficulties in administration, would be to vest the power to tax in the state of the market, subject to power in the forwarding state also to tax by allowing credit to the full amount of any tax paid or due at the destination. This too is more nearly consonant with what the more recent decisions have allowed, if full account is taken of their effects."

And these quotations from Mr. Justice Rutledge show precisely the approach which the State of Washington follows in avoiding multiple taxation. (See p. 33, *supra*.)

B. The Commerce Clause Does Not Require an In-State Office Through Which Sales Are Channeled As a Prerequisite to the Tax in Question (GM Br. 45-55)

Having disposed of General Motors' contention that the tax here involved is "discriminatory" against interstate commerce, we must now inquire into whether it constitutes an "undue burden" on such commerce.

General Motors argues that "* * * a tax measured by unapportioned gross receipts may only be levied on a local business realistically separated from the process of interstate commerce." (GM Br. 45.) Thus, from General Motors' interpretation of *Norton* we are asked to conclude that

> "All that *Norton* requires is that the taxpayer segregate his interstate business and transactions from any local taxable business: * * *" (GM Br. 46.)
>
> "Ever since the *Norton* decision, it has been understood that an interstate seller had to have some local office or store conducting a separate intrastate business participating in its interstate sales before the seller could constitutionally become subject to this type of transaction or gross receipts tax on such sales. A local office, sufficiently substantial to be a separable and taxable business, is the *sine qua non* for this type of tax. * * *" (GM Br. 47.)

General Motors' interpretation of *Norton* differs from the conclusion reached by the State Supreme Court which concluded

> "* * * the mere physical presence of an office within the state has never been the

> sole criterion for validating a state's assessment of a tax. Conversely, absence of a local office does not render the conclusion automatic that sufficient nexus to validate a tax is lacking. The essential inquiry must be directed to the amount and effect of the activities involved and not the form of the operations. * * *" (R. 449.)

General Motors asserts at page 37 that "the Washington Supreme Court does not in terms find any intrastate commerce nor any realistically separable local business." But in fact the Washington Supreme Court does quite the contrary. The Washington Court declared, among other things, that

> "* * * the substance of each transaction occurs in Washington where the customer is located and where the demand for the manufactured product exists, in very large degree, as a result of General Motors promotional activities." (R. 450.)

The assertion that there is no separate identifiable local activity within the State of Washington is quite unrealistic, we think. The activities engaged in by General Motors here, contrary to its contention, are of the broadest, most intricate and most significant variety. Beginning with the comprehensive and delicate procedure of developing and maintaining its retail dealer organization, General Motors' field personnel engage in every variety of sales and promotional effort on the local activity, all designed to stimulate the sale of its product at the retail and wholesale level. The extreme degree of control that

it has over members of its retail organization (although it may be conceded that they are legally independent of General Motors) is unique and extraordinary.

From our earlier discussion (*supra*, pp. 32-33), we have seen that the tax in this case is directed to the "in-state" business activities described above. But those activities, says General Motors, are really "promotional activities," according to Professor Beaman, and as such are exempt according to this Court's opinion in *Nippert v. City of Richmond*, 327 U. S. 416. (See GM Br. 49-52.)

The State submits that any contention that General Motors' activity here is to be likened to that of an itinerant "drummer" in *Nippert* is untenable in view of the very considerable quantity of evidence to the contrary in the record here.

Thus, *Norton Co. v. Department of Revenue*, 340 U. S. 534, and *Field Enterprises, Inc., v. State*, 47 Wn. (2d) 852, 280 P. (2d) 1010, aff. per curiam 352 U. S. 806, dispose of the same "interstate commerce" arguments now made by General Motors here. And it should be noted that *Field*, unlike *Norton*, involved no intrastate sales at all, but only activities performed solely in connection with interstate sales.

It is true that in *Norton* and *Field* the taxpayer conducted certain activities through local offices.

However, as the Washington State Supreme Court forcefully stated,

> "* * * absence of a local office does not render the conclusion automatic that sufficient nexus to validate a tax is lacking. The essential inquiry must be directed to the *amount and effect* of the activities involved and not the form of the operations. * * *" (R. 449.) (Emphasis supplied.)

West Publishing Co. v. McColgan, 328 U. S. 823 (1946), provides adequate authority for the Washington Court's position, and a complete answer to any argument that presence of an office is essential in order to sustain state taxing power.

> "* * * The opinion [*West Pub. Co. v. McColgan, supra*] was not grounded on the triviality that office space was given West's solicitors by attorneys in exchange for the chanceful use of what books they may have had on hand for their sales activities. * * *" *Portland Cement Co. v. Minnesota*, 358 U. S. 450 (1959), at 461.

West Publishing Company cited as one of the controlling cases, *International Shoe Co. v. Washington*, 326 U. S. 310 (1945), which did not involve any office at all.

Although it is the State's position that presence of a local office is not an essential prerequisite to state taxing power, it should be noted that General Motors' field representatives are in effect "officed" within the state by virtue of the use of private homes for receipt of business mail and telephone calls.

Accordingly, the only factor of any significance distinguishing the *Norton* and *Field* cases from the

present factual situation (the fact that some activities are not carried on through an office, with a sign on the door, physically located in Washington) is not of sufficient importance to prevent the *Norton* and *Field* cases from being dispositive of General Motors' contentions in this appeal.

The standards of fairness applied in *Norton* are certainly more than met here. For here we have, not just mechanical forwarding, as a convenience to the customer, of orders, or breaking down of shipments of merchandise; we have instead constant and extensive in-state operations which are absolutely necessary for and indeed the key to the entire wholesaling operation.

The State turns now to the final aspect of the "First Question—Interstate Commerce." Thus, if the scope of in-state activity engaged in by a multistate business is irrelevant to the question of the limits of the State's power of taxation under the commerce clause; and if the State's power of taxation is to be decided under the commerce clause according to whether or not General Motors chooses to establish some "local office" which has something to do with the orders used to measure such a tax, then at least as to Chevrolet Class A transactions the tax is valid because General Motors established such an office in Seattle which expedited deliveries of products of Class A. (R. 18.)

General Motors argues, however (GM Br. 54), that the activities of the Chevrolet branch office are

"* * * like that of the market agent in *Gwin, White & Prince v. Henneford.*" (GM Br. 54.)

However, contrary to General Motors' assertion, *Field Enterprises* and *Norton* disposed of that contention. Thus, the in-state activities shown by the record here quantitatively and qualitatively bear more significant relation to the sales used to measure the tax here than did the in-state activities in *Norton* and *Field.* It must also be equally apparent, even to General Motors, that the activity and role of its Seattle branch office is just as significant, if not more so, than the in-state offices in *Norton* or *Field.* Furthermore, it must also be apparent to General Motors that *Gwin, White & Prince v. Henneford* is distinguishable from *Norton, Field* and this cause, because Gwin involved "out-shipments" from a producer state.

SECOND QUESTION—INTERSTATE COMMERCE

General Motors contends that the imposition of a tax, under the wholesaling category, upon its business activities in Washington is unconstitutionally discriminatory simply and solely because of one feature of the Washington tax law, found in RCW 82.04.440. (Quoted in GM Br. 3a-4a.) This feature is that, under this statute, when local business activities take place on both the manufacturing and wholesaling levels, these activities are not considered as two separate taxable incidents to the extent that the manufacture and sale of the same products are involved; rather, there is only one taxable incident.

This is accomplished by exempting from the manufacturing category of the tax those who are also taxable under the wholesaling category with respect to the same products.

This, General Motors says, produces "* * * actual double taxation, not borne by a local competing manufacturer, * * *." (GM Br. 56.) or at least "* * * possible, fortuitious multiplication of burdens. * * *," if not "* * * actual double taxation * * *" (GM Br. 57.)

And why? Because says General Motors, another taxing jurisdiction may, and in the case of the city of St. Louis actually does, levy a tax upon General Motors' manufacturing activities, thus producing a hypothetical tax burden upon General Motors which a manufacturer-wholesaler operating solely in Washington does not have to bear.

The implications of this argument are so startling that they deserve a very careful analysis.[1]

Analysis of General Motors' Argument

The first point to be noted is the exact nature and thrust of the argument. Exactly the same argu-

[1]This precise question was presented to this Court in *Field Enterprises, Inc. v. State of Washington.* (Jurisdictional Statement, p. 9: *Field Enterprises, Inc. v. State*, No. 214 October Term 1956.) This Court rejected the appellant's argument, per curiam, affirming the opinion of the Washington State Supreme Court sustaining the Washington tax. However, because of the serious implications of this argument, appellees prefer not to rely solely on this case, but to meet the argument head-on.

One implication might be noticed preliminarily here. The argument would invalidate not only the taxes involved in this case, but also the taxes which General Motors is presently paying upon its business activities involving the Seattle Parts Division Warehouse and the Seattle Zone office, simply because the products involved are manufactured outside the state.

ment could be made, and, if General Motors is to be consistent, would have to be made, even if no tax were ever imposed upon local manufacturing activities. That is, if General Motors' argument is valid, it must be valid even if Washington *never* imposed a tax on manufacturing activities, and General Motors' complaint would have to be the same if Washington failed to impose such a tax under *all* circumstances, rather than just under certain circumstances.

This can be seen from the fact that alleged competitive disadvantages which General Motors complains of would exist to exactly the same extent even if the Washington State Legislature decided to leave *all* manufacturing activities free of taxation.

General Motors concedes that everyone pays only *one tax in* Washington. (GM Br. 56.) But General Motors argues since it *may* be taxed on its out-of-state manufacturing activities by another state as well as the in-state wholesaling activities in Washington the tax here exposes it to unconstitutional "double taxation." (GM Br. 56.)

What exactly is the nature of this "double taxation" complained of? Perhaps it can best be shown by an illustration. Assume that the taxpayer involved in *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951), manufactured its products in St. Louis, Missouri, instead of Worcester, Massachusetts. Assume further that Illinois has no manufacturing tax but only the retailing tax involved in

Norton, supra. This retailing certainly would not be unconstitutional simply because Illinois levies no manufacturing tax while St. Louis does. (*Cf. American Manufacturing Co. v. City of St. Louis*, 250 U. S. 459.)

Again: assume that State A wishes to provide an incentive for the location of manufacturing industries and grants certain property tax immunities to such industries. Certainly an out-of-state manufacturer selling in State A will not be heard to complain of that State's general tax on selling activities simply because the State where *it* manufactures grants no such tax immunity as does State A.

In summary, what General Motors is really seeking by this argument is some sort of guarantee from the State of Washington that regardless of the varieties of tax systems in the various states in which it in fact operates, General Motors' total tax burden, beginning from its manufacturing operations and ending with the selling of its products in Washington, will never be more than it would be if General Motors were operating solely in Washington. This is a revolutionary suggestion and one which we think can only aid General Motors' bigness at the expense of the several states.

General Motors charges that the State Supreme Court erred in refusing to "* * * compare the *total activity* of the out-of-state manufacturer with the total activity of the in-state manufacturer * * *" (GM Br. 59.) The Court made no such error.

If by "total activity" we are asked to consider the total of all *taxes* imposed upon General Motors from Detroit to market (as to products manufactured in Detroit), are we then required to consider the total of all taxes from Seattle to market (as to products manufactured in Seattle) when determining validity of a Washington tax on manufacturers? No decision of this Court has ever imposed such a requirement.

Halliburton Oil Well Cementing Co. v. Reily, Distinguished

The fallacy in General Motors' whole argument is disclosed by its misreliance upon *Halliburton Oil Well Cementing Co. v. Reily*, 373 U. S. 64 (1963).

Halliburton is distinguished simply because the problem there is fundamentally different from that presented here. Thus in *Halliburton* this Court described the problem as follows:

> "* * * [Taxpayer] contends, however, that in this case Louisiana has departed from the norm of tax equality and imposes on the appellant a greater tax burden solely because the property it uses in Louisiana is brought from out of state. The difference in tax burden is admitted by the appellee." (373 U. S. 64, 66.)

The vice of the tax in *Halliburton* is that Louisiana, by itself, imposed upon the taxpayer a greater tax burden than it otherwise would have imposed solely because the property of the taxpayer used in Louisiana was brought in from outside the state. The unconstitutional discrimination, therefore, was

found precisely and solely in the difference between two measures used by Louisiana for the same property, this difference depending solely on whether or not the property involved came from outside the state or originated inside the state. This Court did not do what the appellant here is asking it to do; namely, strike down a general and uniform tax imposed by one state simply because the taxpayer may be exposed to another type of tax in another state.

Halliburton would be applicable if the State of Washington imposed upon General Motors a tax on its business activities at a higher rate than it imposes upon strictly local manufacturer-sellers solely because General Motors sells products manufactured outside the state. But this is precisely what the State of Washington does not do.

Re: "Multiple Burdens" and "Discrimination"

The State recognizes that the states may not discriminate in taxation

> "* * * against interstate commerce either by providing a *direct commercial advantage* to local business, * * *; or by subjecting interstate commerce to the burden of '*multiple taxation*', *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157 (1954); *J. D. Adams Manufacturing Co. v. Storen*, 304 US 307 (1938). * * *" (*Northwestern States Portland Cement Co. v. Minnesota*, 358 US 450 (1959)) (Emphasis supplied.)

But to assert that the tax involved here produces a "direct commercial advantage," "multiple burdens"

or "discrimination" would vastly expand the meaning of the terms "direct commercial advantage" and "discrimination" and "multiple burden" as heretofore defined by this Court.

"Direct commercial advantage" for strictly local business, and "discrimination" against interstate business is illustrated by such cases as *Halliburton* and *West Point Grocery v. Town of Opelika*, 354 U. S. 390, in which the tax burdens of the state (or municipality) were lower for the strictly local business than for the multi-state or interstate business.

And the "multiple tax burden" alleged by General Motors (GM Br. 57) can be said to be real only if Washington is prohibited from measuring the Washington tax on General Motors' in-state selling activities by the sales price of General Motors' products, solely because St. Louis or some other taxing jurisdiction may have used a portion of the same gross proceeds to measure a tax on manufacturing activities.

This Court has never held that an unconstitutional "multiple burden" results simply because the same gross proceeds of sale may be used by two different states to measure two different taxes upon two completely different activities, such as manufacturing and selling.

If this is the rule of "multiple burdens," then any tax by a market state which is imposed upon the in-state selling activity of an out-of-state manufacturer and is measured by gross proceeds of sale of

the products, such as the tax in *Norton* and *Field*, would be unconstitutional, unless the market state also imposed a tax on all manufacturing. The State knows of no case of this Court laying down such a rule, and General Motors has cited none.

Third Question—Due Process

The constitutional limitation upon the state tax power under the due process clause was described generally by this Court in *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435 (1940), as follows:

> "The Constitution is not a formulary. It does not demand of states strict observance of rigid categories nor precision of technical phrasing in their exercise of the most basic power of government, that of taxation. For constitutional purposes the decisive issue turns on the operating incidence of a challenged tax. A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Wisconsin v. J. C. Penney Co., supra*, p. 444.

This quotation points up the two key questions involved in General Motors' due process argument. First, what is the operating incidence of the tax? Second, does the measure of the tax bear a reasonable relationship to General Motors' in-state activities?

General Motors' mischaracterization of the tax as a sales or transactions tax (GM Br. 61, 67) has already been discussed, *supra*, p. 31. The purpose of this mischaracterization, however, now becomes clear: General Motors is thereby enabled to assert that the tax involved here "* * * reaches transactions outside Washington's territorial jurisdiction * * *," (GM Br. 61.)

The incidence of the tax was clearly pointed out by Chief Justice Finley, speaking for the Washington State Supreme Court:

> "* * * The activities of General Motors in Washington in relation to these sales provide a sufficient nexus upon which to base the tax. Thus, the state is taxing only that which takes place within its borders, and measuring the tax by transactions which relate sufficiently to the activities in question to be within the requirements of the due process clause." R. 451.)*

The fallacy of General Motors' assertion that Washington is taxing "transactions outside Washington" is pointed up by *Norton Co. v. Department of Revenue*, 340 U. S. 534 (1951), and *Field Enterprises, Inc. v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010, 352 U. S. 806 (1956). The fact that the tax is measured by interstate sales and transactions in which title passes outside the taxing state did not invalidate the use of such sales as a measure of taxes on

*This quotation also points up the incorrectness of appellant's assertion that the Washington State Supreme Court considered the measurement of the tax constitutionally immaterial. (GM Br. 65.)

in-state activity in those cases; and the tax here is no more a tax on out-of-state sales or transactions than the taxes there.

General Motors' alternate due process argument is based upon a second mischaracterization. Thus, General Motors says that the measure of the tax "* * * bears no reasonable relation to activities within the state." (GM Br. 61.) And General Motors mischaracterizes the "activities within the state" as follows:

> "All that has been done here within the jurisdiction is (1) to beam in national advertising * * *; (2) to watch and advise the retail dealers (customers) in the conduct of their business; and (3) to have customers within the jurisdiction. * * *" (GM Br. 62.)

This overlooks the detail of activities which "* * * pervade virtually every aspect of the retail dealers' operations * * *" (R. 450) and the regular and constant contact with the dealers in the State of Washington which this detail of activity necessarily involves. It also overlooks the function of district managers in securing orders at the dealer's place of business and much other detail described in the counterstatement of facts, *supra*.

Finally, General Motors argues that:

> "This Court has never held that an unapportioned gross receipts tax could be imposed for the privilege of doing business in a jurisdiction where there was no office participating in the business, and has frequently held to the

> contrary. *Norton Company v. Department of Revenue*, 340 U. S. 534. Until now, a local office, sufficiently substantial to be a 'separable local business,' has been the *sine qua non* for this type of tax." (GM Br. 65.)*

The question put is therefore: Does the due process clause require an in-state office as a condition precedent to the type of tax involved here, regardless of the nature and extent of the business activity being subjected to tax?

The State Supreme Court answered this foregoing question as follows:

> "* * * the mere physical presence of an office within the state has never been the sole criterion for validating a state's assessment of a tax. Conversely, absence of a local office does not render the conclusion automatic that sufficient nexus to validate a tax is lacking. The essential inquiry must be directed to the amount and effect of the activities involved and not the form of the operations. * * *" (R. 449.)

The validity of the State Court's conclusion is supported when the "amount and effect" of General Motors' in-state activities in this case are compared to the "in-state" activities in *Norton*, *supra*, and *Field Enterprises, Inc. v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010, 352 U. S. 806 (1956).

In *Norton*, the personnel at the Illinois retail outlet performed essentially two functions in con-

Elsewhere General Motors argues that even though it had an office which expedited deliveries of merchandise in the Chevrolet Class A transactions, such activities are " * * like those of the market agent in *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939).

nection with the transactions there in controversy. They forwarded orders to the out-of-state manufacturing plant, and broke down carload shipments into separate orders for the individual customers. In *Field*, the function of the in-state office was to supervise solicitors and to forward to the taxpayer's Chicago headquarters orders received by the solicitors. And, unlike *Norton*, the office in *Field* had absolutely no connection whatever with any kind of local sale.

In applying *Norton* and *Field* to this case, we are met with two initial questions. Is the essential question the nature and extent of the activities the taxpayer's personnel within the state? Or is the essential question whether or not these activities, whatever their nature and extent, had some connection with a local physical establishment? The State submits that the essential question under the due process clause is the first one.

General Motors' in-state deliveries here are clearly more essential to the consummation of sales of General Motors' products than merely forwarding orders and breaking down carload shipments. (See *Norton Co. v. Department of Revenue*, 340 U. S. 534.) Yet, this Court, in *Norton*, held that the local activities of forwarding orders and breaking down of carload shipments provided sufficient connections with the sales involved to allow inclusion of these sales in the measure of the tax.

Any attempt to characterize General Motors' in-state activities here as mere solicitation or drumming is answerable by reference back to our earlier

discussion of *Nippert v. City of Richmond*, 327 U. S. 416 (1946), *Supra*, p. 52.)

Moreover, aside from the vastly more significant quantity of in-state activity practiced by General Motors here, it is to be remembered that General Motors otherwise localized itself in permanent physical facilities of various divisions and subsidiaries. (General Motors' Parts Division Warehouse, United Motors Service, GMAC, and the Chevrolet Branch Zone Office: See Counterstatement of the Case, *supra.*)

Applying considerations discussed by this Court in *Norton, supra,* it is clear that General Motors is *not* regarded by the trade as "remote and unaccessible." General Motors can be reached "with process of local courts for breach of contract, or for services if the goods are defective or in need of replacement." *Norton v. Department of Revenue, supra,* p. 539.

And so unless we are to reduce application of the due process clause to a matter of "tags," i.e., "office" or "no office," it is clear that application of the tax here is even more justifiable in this case than in *Norton* and *Field* as to all of General Motors' in-state activities here. However, if we must resolve the due process question put by General Motors by "tags," then it is certain that the existence of the Chevrolet Branch Office which expedited deliveries in the Chevrolet Class A transactions meets any such criterion.

CONCLUSION

> "As has been so often stated but nevertheless seems to require constant repetition, not all burdens upon commerce, but only undue or discriminatory ones, are forbidden." *Nippert v. City of Richmond*, 327 U. S. 416, 425.

The tax involved herein is in no way discriminatory against interstate commerce. No other state can levy a tax upon General Motors' selling activities measured by the same gross receipts which Washington uses to measure the tax here in question. *Freeman v. Hewit*, 329 U. S. 249. Therefore, there can be no question of multiple burdens upon or discrimination against the selling operations of General Motors simply because gross proceeds of sale are used to measure the tax.

Nor is there any discrimination against General Motors simply because the State of Washington fails to levy a manufacturing tax upon in-state manufacturers when such manufacturers must also pay a Washington tax on their selling activities. The fact that General Motors may be exposed to a tax by other states upon its manufacturing operations in those other states, while a Washington manufacturer is not so taxed, does not constitute unconstitutional discrimination. For what the commerce clause demands is that similar operations and similar property be treated equally by the taxing state, even if the operations cut across state lines or the property comes from outside the state. *Halliburton Oil Well*

Cementing Co. v. Reily, 373 U. S. 64 (1963). It does not demand that one state must, in effect, guarantee that both in-state and out-of-state tax burdens upon completely distinct activities or operations cannot, in total, exceed the total in-state tax burdens on a strictly intrastate business.

Nor should the tax be invalidated on the basis of the dual mischaracterization of it made by General Motors. It is not a tax on sales or transactions that take place outside the state, for the reason that it simply is not a tax upon sales or transactions at all. Neither is it a tax on the privilege of engaging in exclusively interstate business. Rather, it is a tax upon business activities taking place solely within the state, measured only by gross receipts from sales or transactions attributable to these activities. *Field Enterprises, Inc., v. State*, 47 Wn. (2d) 852, 289 P. (2d) 1010, affirmed per curiam, 352 U. S. 806.

Finally, the tax should not be invalidated as an undue burden upon interstate commerce or as a deprivation of property without due process of law simply because part of the sales or transactions used to measure the tax were not channeled through a local office. For General Motors, through its activities in Washington, has just as completely localized itself with respect to such transactions, and has just as permanently established itself in the State, as it would have through a local office. The inquiry should be directed to the nature and extent of the in-state activities which produce the sales used to

measure the tax, not whether or not these activities are somehow connected with a local office.

Accordingly, the Judgment of the Supreme Court of the State of Washington should be affirmed.

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